

McCartney, Incorporated and United Food and Commercial Workers Union, Local 76, affiliated with United Food and Commercial Workers International Union, AFL-CIO-CLC. Case 16-CA-10914

19 July 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS
ZIMMERMAN AND DENNIS

On 30 November 1983 Administrative Law Judge Lawrence W. Cullen issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, McCartney, Incorporated, Tulsa, Oklahoma, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

DECISION

STATEMENT OF THE CASE

LAWRENCE W. CULLEN, Administrative Law Judge. This case was heard before me on October 17, 1983, at Tulsa, Oklahoma. The hearing was held pursuant to a complaint issued by the Acting Regional Director for Region 16 of the National Labor Relations Board (the Board). The complaint is based on a charge filed by the United Food and Commercial Workers Union, Local 76, affiliated with the United Food and Commercial Workers International Union, AFL-CIO-CLC (the Union or the Charging Party) on February 14, 1983. The complaint (as amended the hearing) alleges that McCartney, Incorporated,¹ a corporation (Respondent), has violated Section 8(a)(1) of the National Labor Relations Act (the Act) by on or about February 12² at Store No. 2 unlaw-

fully interrogating its employees regarding the employees' need for union representation and by threatening retaliation by leasing out its Tulsa stores' meat markets because its employees filed grievances, and on or about February 12 at Store No. 1 threatening its employees with retaliation by leasing the Tulsa stores' meat markets because its employees had filed grievances. The complaint is joined by Respondent's answer filed April 4, wherein it denied the commission of any violations of the Act and asserted affirmative defenses thereto.

Upon the entire record in this proceeding, including my observations of the witnesses who testified herein, and after due consideration of the positions of the parties as expressed at the hearing and the brief filed by Respondent, I make the following

FINDINGS OF FACT AND ANALYSIS

I. JURISDICTION

A. *The Business of Respondent*

The complaint alleges, Respondent admits, and I find that Respondent was and has been at all times material herein, an Oklahoma corporation engaged in the sale and distribution of retail groceries with an office and place of business in Tulsa, Oklahoma; that during the past 12 months, a representative period, Respondent, in the course and conduct of its business operations in Tulsa, Oklahoma, purchased and received goods valued in excess of \$50,000 directly from suppliers located outside the State of Oklahoma, and had a gross income in excess of \$500,000; and that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

B. *The Labor Organization*

The complaint alleges, Respondent admits in its answer, and I find that the Union is now and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

This case involves meetings held by John McCartney,³ the owner of Respondent, and two of its grocery stores in Tulsa, Oklahoma (Store No. 1 and Store No. 2) on February 12 with certain of Respondent's meat market employees at each of the two stores. The General Counsel presented the testimony of employees Sherman (Darrell) Largent Jr., Joyce Zellner, and Helen Delk.

Largent testified as follows: He has been employed by Respondent since January 1976 and was employed as a journeyman meatcutter at Store No. 2 in Tulsa, Oklahoma, on February 12. He and other meat department employees⁴ (six employees) attended a meeting at which

³ The complaint alleges, the answer admits, and I find that McCartney is the owner of Respondent and was an agent and/or supervisor of Respondent, acting in its behalf within the meaning of Sec. 2(11) and (13) of the Act at all times material herein.

⁴ These employees were covered by a collective-bargaining agreement between Respondent and the Union (G.C. Exh. 2—the November 16, 1980–November 19, 1983 labor agreement).

¹ The official caption of Respondent was amended at the hearing.

² All dates are in 1983 unless otherwise stated.

McCartney spoke. Also present for Respondent were Bill Stafford, general manager, and Bill Butler, meat supervisor.⁵ At the meeting McCartney announced that he had planned to lease out the meat department as "he was tired of being harassed by people parking in front of his home, threatening phone calls to his family; [he] was tired of having vehicles shot at and equipment; and there was a few employees that he wanted to—that he did not plan to keep if the markets were leased out." McCartney discussed a new store that was to be opened and which he maintained would hurt this store and it was necessary to "bring up the gross profits, percentages and things of that nature." McCartney also talked of hiring employees "to work the counters and do the clean ups at a lower wage because he didn't want to pay us [the employees] a higher wage to do clean up or work counters" McCartney also discussed the requirement that he pay insurance benefits for part-time employees.

Largent took notes which he destroyed after the meeting. McCartney observed Largent taking notes and asked Largent why he needed a union. Largent responded that he felt the employees need a union for job security. Largent testified further that McCartney stated "he was tired of grievances being filed against the Company" with the Union and that the meat departments at the two stores in Tulsa would be leased out as a result of trouble with the Union through grievances at these stores where-as the meat department in Respondents two stores in Oklahoma City would not be leased out. McCartney stated that he would take care of some employees who were not currently fully vested in their pension rights by paying them to ensure that they would be vested.

On cross-examination Largent agreed that in July 1982 the issue of subcontracting the work performed in the meat departments had been discussed in a meeting between management and the employees as had the number of grievances being filed by the employees. Largent also testified that at the February 12 meeting the subject of grievances was initially raised by McCartney.

Joyce Zellner testified as follows: Zellner works at Store No. 2 and was present at the February 12 meeting held at that store. McCartney spoke at the meeting and "said that he was getting tired of being harassed by the union; harassed and too many grievances filed. He said that he would like to—he thought about leasing out the markets and he was going on a new program in about three months with us or without us and that it was—he would like to have cheaper help to do clean ups and that our health and welfare was \$400 a month and sometimes we would have part-time help come in and he would still have to pay that." He also stated that two employees who were not vested in their pension rights would be vested as he would do that. Largent was taking notes and McCartney asked what do you think of it Darrell since you are taking notes and Largent replied that he did not think the employees should be punished for something that one person had done (referring to a particular ex-employee about whom McCartney had com-

plained) and should stay with the Union. McCartney also stated he was not having any union problems with the two stores in Oklahoma City and that they would remain as union markets. On cross-examination Zellner stated that McCartney had stated he was tired of the grievances being taken to the Union by "the people" (employees) and of "his family being harassed." McCartney also stated that he had attempted to discuss problems with the Union and had sent letters but received no response. She was unable to recall whether McCartney had discussed what particular problems he had attempted to discuss with the Union.

Helen Delk testified as follows: She is employed by Respondent as a meat wrapper at Store No. 1 in Tulsa, Oklahoma. On February 12 she attended a meeting attended by seven of the eight meat department employees at that store and by McCartney, Stafford, and Butler. McCartney spoke and stated he was planning to lease out the markets (meat), that all the employees would have their jobs at the same rate of pay but he would like to bring in cleanup employees at a lower rate of pay. He did not know what the employees benefits would be but would assure them that three employees who were not currently vested (in their pension rights) would be. He stated that "unless we could resolve our differences . . . he was going to have to lease the markets." He was asked what date he planned to do this and replied that he did not have a date as yet.

He also stated that union markets were "going down" and nonunion markets were "doing better." He was asked about the two stores in Oklahoma City and said, "There had been no trouble there so that they would not be leased out." On reviewing her affidavit she recalled that McCartney stated that there had been a lot of grievances filed.

Respondent called McCartney to testify in its behalf. He testified as follows: As of February 12 he owned four stores. The meat departments in the two stores in Tulsa, Oklahoma, are covered by a labor agreement with the Union (G.C. Exh. 2). During the term of this agreement he received an offer from outside employers to subcontract his meat departments. He is aware that a letter was sent by his attorney to the Union (R. Exh. 1).⁶ He subsequently received a copy of a letter from the Union responding thereto.⁷ No negotiations of the subject of subcontracting took place in 1983. During the months of January and February he received comments from managerial employees and from meat cutters concerning rumors of subletting the departments in Tulsa and Oklahoma City.

⁶ R. Exh. 1 is a letter dated January 20 from his attorney Lynn Paul Mattson to John Stone of the Union in which Respondent raised with the Union the subject of contracting out the meat department in the two Tulsa stores and asked to bargain concerning the impact of such a decision on the employees therein who were currently represented by the Union.

⁷ R. Exh. 2 is a letter dated February 3 stating that the Union has no obligation to bargain concerning subcontracting under the terms of the existing contract (G.C. Exh. 2) and has no intention of doing so during the existing contract but would discuss the subject when the current contract came up for negotiation.

⁵ The complaint alleges, Respondent's answer admits, and I find that Stafford and Butler were agents and/or supervisors of Respondent within the meaning of Sec. 2(11) and (13) of the Act.

On February 12, he talked with the employees at the two stores in Tulsa. In Store No. 2 he met with the employees in the meat department and answered questions of the employees concerning leasing of the meat departments, told them it was premature but that Respondent had had discussions "with two different individuals concerning leasing the Tulsa markets" and reminded them of an earlier meeting in July (1982) wherein operational problems in the two Tulsa meat departments had been discussed. He told the employees that gross profit was below what it should be ("3 percent") and distribution was down ("25 and 30 percent") from what it had been "a few years earlier." He observed Darrell Largent taking notes "and later on asked him something about taking notes. I don't recall what it was. It wasn't anything important." He does not recall asking Largent why he needed a union. "I don't recall asking him that specific question. I could have asked him something akin to that in reference to something. I don't recall asking him a blanket question why do you need a union?" He believes the subject of grievances was raised by one of the employees during the meeting and a discussion of harassment (Respondent's compressors shot out, bullet holes in a company car, windows of a company car broken). None of these incidents was connected with the structure of the grievance procedure. Someone at the meeting asked if Respondent "had received a lot a grievances." There had been five grievances during the life of the labor agreement. He was asked if subcontracting would occur at the Oklahoma City stores and responded, "No, primarily because we were not having the operational problems, i.e., low gross profits, poor distribution, higher cost of labor factor that we were having in the Tulsa stores." He did not tell the employees at either the meeting held at Store No. 1 or Store No. 2 that one of the reasons he wanted to subcontract out the meat market operations had to do with the number of grievances that had been filed. The meeting at Store No. 1 was similar to that at Store No. 2 although the questions of pension vesting came up in the subsequent meeting. He does not recall the issue of the unjustified nature of any grievances coming up at either meeting.

On cross-examination he testified that there were a total of seven grievances at both Stores No. 1 and No. 2 during the term of the labor agreement.

Analysis

The General Counsel contends that it is undisputed that McCartney interrogated Largent and asked him why the employees needed a union and contends that the testimony of the General Counsel's witness concerning McCartney's statements at the two meetings with respect to alleged union harassment is virtually unrefuted and that neither of Respondent's affirmative defenses have merit.⁸

⁸ The affirmative defenses are:

1. That the Charging Party should be estopped by its conduct from asserting that a violation of the Act has occurred as the Union's own refusal to bargain gave rise to the meetings in which the supposed allegation occurred.

Respondent contends that McCartney called the meetings on the spur of the moment in order to allay its employees' fears concerning rumors of an impending decision to subcontract or lease out its meat market operations following Respondent's request to bargain with the Union concerning the impact of such a decision and the Union's refusal to do so during the term of the existing labor agreement. Respondent contends that the questioning of Largent, if it occurred, was noncoercive in nature and took place in the context of a general discussion and was not directed at Largent personally, did not constitute interrogation as it did not seek to elicit Largent's view and, under the circumstances, if this were found to be a violation, it was a de minimis violation and waste of the Board's resources to litigate.

With respect to the allegations of threatened retaliation, Respondent contends that the meetings were designed to allay employees fears by apprising them of the possibility of the contracting out of its meat markets because of economic considerations. Respondent contends that McCartney denied having discussed the filing of grievances as a reason for the consideration of subcontracting its meat market operations but rather that economic factors were discussed and that there is thus no evidence that the alleged violation occurred. Further, Respondent contends McCartney assured the employees that they would retain their jobs and no adverse consequences would occur.

I find that the General Counsel has established a prima facie case of a violation of Section 8(a)(1) of the Act by Respondent with respect to the interrogation of Largent by McCartney as to why the employees needed a union and by telling the employees in Store No. 2 that the work in the meat departments in Stores No. 1 and No. 2 in Tulsa, Oklahoma, would be subcontracted out as a result of the filing of grievances and union harassment. I found the testimony of Largent to be specific and believable and I credit it. I also credit the testimony of Zellner which was largely corroborative of that of Largent. To the extent that their testimony may differ particularly with respect to the questioning of Largent by McCartney, I credit Largent's version as the more reliable. I found the testimony of Largent and Zellner as to the statements made by McCartney as to the reason for contracting out the meat departments of the Tulsa stores support a finding that McCartney tied the need for doing so to the filing of grievances with the Union as opposed to the situation in Oklahoma City where there had been no "union trouble." Given the small complement of employees in the two stores meat departments (Nos. 1 and 2) of 15 full-time employees, I am not persuaded by Respondent's argument that the total of 7 grievances filed at both stores was not significant enough to incur the displeasure of McCartney. I found McCartney's lack of a specific denial of his alleged interrogation of Largent to leave un rebutted Largent's testimony that McCartney interrogated him concerning the employees' need for a union. I find that this interrogation was not designed to

2. That any and all statements, whether as alleged or otherwise, made by agents of the employer, were within the free speech proviso of the National Labor Relations Act.

elicit information from Largent in the traditional sense but rather was to persuade him and others to abandon their support for the Union in the face of the impending threat of the subcontracting out of the meat market operations and the loss of benefits or changes in working conditions that could accompany this subcontracting out. While it is undisputed that McCartney cited economic factors as a reason for subcontracting, it is also clear that he cited grievances as a reason for doing so. I further reject Respondent's argument that no economic sanctions were threatened as it was clear that Respondent discussed changes in pension benefits and working conditions at these meetings which could prove adverse to these employees. I do not find that Respondent's statements with respect to vesting of the employees were sufficient to assure them of no adverse impact as a result of the subcontracting.

I also find that Respondent violated Section 8(a)(1) by its threats to its employees in the Store No. 1 meat market that the meat market operation would be leased out "unless we could resolve our differences," that union markets were "going down" and nonunion markets were "doing better" and that the two meat markets in Oklahoma City would not be leased out because "there had been no trouble there." It is clear from the foregoing testimony of Delk which I credit that McCartney was talking about grievances when he referred to differences and to "trouble" and was encouraging the employees to abandon their support for the Union in his references to union and nonunion markets. I also credit Delk's statement that McCartney stated that there had been a lot of grievances filed. This testimony although given by Delk only after her memory was refreshed by her affidavit was consistent with Delk's testimony as set out above with respect to resolving differences.

I reject as without merit the two affirmative defenses asserted by Respondent.

I thus find that Respondent has failed to rebut the prima facie case of violations of Section 8(a)(1) of the Act and that Respondent did unlawfully threaten retaliation against its employees at Stores No. 2 and No. 1 for filing grievances⁹ and did unlawfully interrogate Largent in order to persuade him and the other employees to abandon their support of the Union.¹⁰

I reject Respondent's contention that these violations of the Act were de minimis as I find they were inherently coercive and violative of the employees' rights under Section 7 of the Act.

III. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The unfair labor practices as found in section II above, in connection with the business of Respondent as set forth in section I, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to disputes obstructing the free flow of commerce.

⁹ See *Midwest Alloys*, 261 NLRB 1054 (1982).

¹⁰ See *Gossen Co.*, 254 NLRB 339 (1981); *Caterpillar Tractor Co.*, 257 NLRB 392 (1981).

CONCLUSIONS OF LAW

1. Respondent McCartney, Incorporated is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. United Food and Commercial Workers Union, Local 76, affiliated with United Food and Commercial Workers International Union, AFL-CIO-CLC is a labor organization within the meaning of Section 2(5) of the Act.

3. By its interrogation of employee Sherman (Darrell) Largent Jr., on February 12, 1983, as to why the employees needed a union, Respondent violated Section 8(a)(1) of the Act by coercively attempting to persuade Largent and the other employees to abandon their support for the Union.

4. By its threats of retaliation on February 12, 1983, that it would lease out the operations of its meat markets in its two grocery stores in Tulsa, Oklahoma, because its employees in these meat markets had filed grievances, Respondent violated Section 8(a)(1) of the Act.

5. The above unfair labor practices have an affect upon commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has committed violations of Section 8(a)(1) of the Act, it shall be ordered to cease and desist therefrom and from any other unlawful activity and to take certain affirmative action designed to effectuate the policies of the Act, including the posting of the appropriate notice.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹¹

ORDER

The Respondent, McCartney Incorporated, Tulsa, Oklahoma, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating its employees as to why the employees need a union in order to persuade them to abandon their support for the Union.

(b) Threatening its employees with retaliation by leasing out its meat market operations in its stores in Tulsa, Oklahoma, because the employees filed grievances against the employer.

(c) Discouraging membership or support of United Food and Commercial Workers Union, Local 76, affiliated with United Food and Commercial Workers International Union, AFL-CIO-CLC by the above acts.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

¹¹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

2. Take the following affirmative action designed to effectuate the purposes of the Act.

(a) Post at its place of business in Tulsa, Oklahoma, copies of the attached notice marked "Appendix."¹² Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted in its two grocery stores in Tulsa, Oklahoma. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

¹² If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT coercively interrogate employees concerning their reasons for supporting a union in order to persuade them to abandon their support for the Union.

WE WILL NOT threaten employees with retaliation by threatening to lease out our meat markets in our two grocery stores no. 1 and no. 2 in Tulsa, Oklahoma, because the employees in these meat markets filed grievances.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

Our employees have the right to join and support United Food and Commercial Workers Union, Local 76, affiliated with United Food and Commercial Workers International Union, AFL-CIO-CLC, or to refrain from doing so.

MCCARTNEY, INCORPORATED